2005

Tammy Bluemel v. State of Utah : Response to Petition for Rehearing

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

TAMMY BLUEMEL, Petitioner/Appellant, **v.** STATE OF UTAH, Respondent/Appellee.	Case No. 20050208-CA

APPELLANT'S RESPONSE TO PETITION FOR REHEARING

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By and through counsel, Appellant Tammy Bluemel hereby submits this Response to Appellee's Petition for Rehearing. Tammy Bluemel is currently incarcerated at the time of this appeal.

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REHEARING ISSUE

Whether this Court's decision in *Bluemel v. State*, 2006 UT APP 141, issued on April 14, 2006 is in accordance with established Utah case law precedent. Specifically, the issue the State seeks rehearing is: Whether the Court was correct in holding that a trial court's failure to strictly follow Rule 11 in accepting a guilty plea is sufficient to grant relief under the Utah Post-Convictions Remedies Act?

STATEMENT OF THE CASE

On September 20, 2001, Ms. Bluemel was charged with seven counts of rape, a first degree felony, and one count of supplying alcohol to a minor. R. 61-62. On December 5, 2001, Ms. Bluemel offered a guilty plea to three counts of rape and one count of supplying alcohol to a minor. The remaining counts were dismissed. R. 50. The trial court did not properly incorporate the plea statement into the record. *Bluemel v. State*, 2006 UT App 141, ¶ 15. The trial court did not inform Ms. Bluemel of all of the Rule 11(e) factors and rights, and only asked Ms. Bluemel if she had any questions about the statement. *Bluemel v. State*, 2006 UT App 141, ¶ 15-16. The trial court failed to inform Ms. Bluemel of her right to the presumption of innocence, that the State carried the burden of proving her guilty beyond a

reasonable doubt, that her plea is an admission of all those elements, and that she had the right to compel the attendance of defense witnesses. *Bluemel*, 2006 UT App 141, ¶ 16. Ms. Bluemel informed her attorney that she wished to file an appeal, in which her attorney informed her it was being handled. After an appeal was not filed, Ms. Bluemel sought present counsel. Counsel filed a Petition for Post-Conviction Relief, which was denied by the trial court. Ms. Bluemel appealed to this Court and this Court found that the trial court erred by dismissing her petition. *Bluemel*, 2006 UT App 141, ¶ 18. The State then filed this Petition for Rehearing.

ARGUMENT

The Appellee, the State of Utah, has filed a Petition for Rehearing in the above captioned matter on the grounds that this Court's holding in *Bluemel* was contrary to established Utah case law precedent. *Blueme v. Statel*, 2006 UT App 141. Ms. Bluemel's petition for post-conviction relief based on Rule 11 violations falls under the interest of justice exception, and therefore is proper under the statute. This Court's ruling in *Bluemel* is also in accordance with established case law in that a trial court's failure to strictly comply with Rule 11 is a constitutional violation subject to relief under the Post-Conviction Relief Act (PCRA). Therefore, this Court should deny Appellee's Petition for Rehearing.

To obtain relief under the PCRA, a petitioner must seek relief "within one year after the cause of action has accrued." Utah Code Ann. § 78-35a-107(1) (2002). But if a court "finds that the interests of justice require, a court may excuse a petitioner's failure to file within the time limitations." *Id.* § 78-35a-107(3). The PCRA contains an explicit bar to any petition that is not brought within one year of the cause of action accruing, but the limitations period is not absolute. It contains a safety valve providing the district court with discretion to excuse any untimely filing when the interests of justice so require. Ms. Bluemel filed a petition for post-conviction relief outside of the one year time limit, however, this Court found that the interest of justice exception to the one year time limit was met based on the trial court's failure to strictly comply with Rule 11 of the Utah Rules of Criminal Procedure.

Ms. Bluemel's petition for post-conviction relief is proper under Section 78-35a-104 which states that:

> "1) Unless precluded by Section 78-35a-106 or 78-35a-107, a person who has been convicted and sentenced for a criminal offense may file an action in the district court of original jurisdiction for post-conviction relief to vacate or modify the conviction or sentence upon the following grounds:
>
> (a) the conviction was obtained or the sentence was imposed in violation of the United States Constitution or Utah Constitution;
>
> (b) the conviction was obtained under a statute that is in violation of the United States Constitution or Utah

> Constitution, or the conduct for which the petitioner was prosecuted is constitutionally protected;
> (c) the sentence was imposed in an unlawful manner, or probation was revoked in an unlawful manner; ..."

Section 78-35a-104. Under subsection (a), Ms. Bluemel's petition was proper because her entry of a guilty plea did not conform to Rule 11 of the Utah Rules of Criminal Procedure. This violation amounted to a constitutional violation of Ms. Bluemel's rights. The trial court did not properly incorporate the plea statement into the record, and during the plea colloquy, the trial court only asked Ms. Bluemel if she had any questions about the statement. *Blueme v. Statel*, 2006 UT App 141, ¶ 15[1]. The trial court never asked Ms. Bluemel if she actually read, understood, and acknowledged her plea statement, or made any other inquiry. *Id.* at ¶ 15. The trial court also failed to inform Ms. Bluemel of all of the Rule 11(e) factors and rights. *Id.* at ¶ 16. Because of this severe deficiency, this Court found that Ms. Bluemel's constitutional rights had been violated.

In support of its Petition for Rehearing, the State cites *Salazar*, which applies to writs for habeas corpus and not for petitions for post-conviction relief based on Rule 11 violations. *Salazar v. Warden*, 852 P.2d 988 (Utah 1993). In *Salazar*, the court found that Salazar's attorneys had made his plea knowingly and voluntarily. *Id.* at 991. The court stated: "[b]ecause we hold

[1] Attached hereto as Addendum A

that a Rule 11 violation does not warrant habeas corpus relief absent the deprivation of a constitutional right, we affirm without treating the compliance issue." *Id.* at 991. This statement by the court was followed with a reference to footnote 6, where the court further stated: "We stress that we are not retreating from our holding in *State v. Gibbons*, 740 P.2d 1309 (Utah 1987), restated in *State v. Maguire*, 830 P.2d 216, 217 (Utah 1992), that the trial court must strictly comply with Rule 11. If this were a direct appeal from denial of a motion to withdraw a guilty plea, for example, failure to strictly comply with the Rule would be grounds for reversal." *Id.* at 991, FN 6. In *Gibbons*, the court stated: "Rule 11(e) squarely places on trial courts the burden of ensuring that constitutional and Rule 11(e) requirements are complied with when a guilty plea is entered." *State v. Gibbons* 740 P.2d 1309, 1312 (Utah 1987). The basis for that duty is found in *Boykin v. Alabama* where the United States Supreme Court stated: "What is at stake for an accused facing [punishment] demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." *Boykin v. Alabama*, 395 U.S. 238, 243-44, 89 S.Ct. 1709, 1712-13, 23 L.Ed.2d 274 (1969). Therefore, the State's reliance on *Salazar* is misplaced because the petition for post-conviction relief was based upon a

Rule 11 violation, not a writ for habeas corpus. If Ms. Bluemel's petition was based upon a writ for habeas corpus, then *Salazar* would be controlling. However, this is not the case, therefore *Gibbons* is controlling and a violation of Rule 11 is a constitutional violation. (Although this Court has stated that mere procedural violations of Rule 11 do not rise to the level of a constitutional violation, the trial court's clear failure to inform Ms. Bluemel of her constitutional rights when accepting her guilty plea is well beyond a mere procedural error. Therefore the State's argument is unpersuasive.)

Pursuant to the Utah Rules of Criminal Procedure:

> "(e) The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found:
>
> (e)(1) if the defendant is not represented by counsel, he or she has knowingly waived the right to counsel and does not desire counsel;
>
> (e)(2) the plea is voluntarily made;
>
> (e)(3) the defendant knows of the right to the presumption of innocence, the right against compulsory self-incrimination, the right to a speedy public trial before an impartial jury, the right to confront and cross-examine in open court the prosecution witnesses, the right to compel the attendance of defense witnesses, and that by entering the plea, these rights are waived;
>
> (e)(4)(A) the defendant understands the nature and elements of the offense to which the plea is entered, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements;
>
> (e)(4)(B) there is a factual basis for the plea. A factual basis is sufficient if it establishes that the charged crime

> was actually committed by the defendant or, if the defendant refuses or is otherwise unable to admit culpability, that the prosecution has sufficient evidence to establish a substantial risk of conviction;
> (e)(5) the defendant knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence, that may be imposed for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences;
> (e)(6) if the tendered plea is a result of a prior plea discussion and plea agreement, and if so, what agreement has been reached;
> (e)(7) the defendant has been advised of the time limits for filing any motion to withdraw the plea; and
> (e)(8) the defendant has been advised that the right of appeal is limited.
>
> These findings may be based on questioning of the defendant on the record or, if used, a written statement reciting these factors after the court has established that the defendant has read, understood, and acknowledged the contents of the statement."

Rule 11, Utah Rules of Criminal Procedure (emphasis added). The trial court's failure to strictly comply with Rule 11 amounts to a constitutional violation under the Utah Constitution and the U.S. Constitution. The Utah Supreme Court requires trial courts to comply strictly with Rule 11 when accepting guilty pleas. *State v. Lehi* 73 P.3d 985, 989 (Utah.App., 2003); See also *State v. Maguire*, 830 P.2d 216, 217 (Utah 1992). In *Mora*, the court found that during the plea colloquy, the trial court failed to inform Mora that, if he chose to go to trial, the State carried the burden of proving him guilty beyond a reasonable doubt. *State v. Mora* 69 P.3d 838, 842-843

(Utah App. 2003). "The right to require the State to prove guilt beyond a reasonable doubt is guaranteed by the due process clauses of the Utah and the United States Constitutions." *Id.* at 842-843; See *State v. Lopes*, 1999 UT 24,¶ 13, 980 P.2d 191 (holding that "as both a state and federal constitutional matter, we conclude that due process requires that the prosecution prove every element of the charged crimes beyond a reasonable doubt" (citing Utah Const. Art. I, § 7; U.S. Const. Amends. V, XIV) (other citations omitted)). "If the defendant is not fully informed of his rights prior to pleading guilty, then the guilty plea cannot be voluntary." *State v. Hittle*, 2002 UT App 134,¶ 10, 47 P.3d 101 (applying plain error test to Rule 11 violation), cert. granted, 59 P.3d 603 (Utah 2002). "We cannot accept an involuntary guilty plea and still claim to have done justice." *Id.* Ms. Bluemel's guilty plea was accepted by the trial court without strict compliance with Rule 11, and under Utah case law, this amounts to a constitutional violation.

By failing to follow Rule 11, the trial court violated Ms. Bluemel's constitutional rights. "Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the

Fourteenth. *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653. Second, is the right to trial by jury. *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491. Third, is the right to confront one's accusers. *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923." *Boykin v. Alabama*, 395 U.S. 238, 243-44, 89 S.Ct. 1709, 1712-13, 23 L.Ed.2d 274 (1969). Therefore, Ms. Bluemel's petition is proper under the PRCA.

As a final attempt for a rehearing, the State argues that "*Bluemel* contradicts Utah precedent because it implies that in assessing whether a plea is knowing and voluntary, a post-conviction court is limited to a review of the plea colloquy and the plea affidavit." Apellee's Brief, p. 5. To support this assertion, the State cites *Salazar*. *Salazar v. Warden*, 852 P.2d 988 (Utah 1993). However, this Court addressed this issue in *Lehi*:

> "We acknowledge the case of *Salazar v. Warden*, 852 P.2d 988 (Utah 1993), in which the Utah Supreme Court did not limit itself to the plea record described in the preceding text. It held: "[A] court ... is not limited to the record of the plea hearing but may look at the surrounding facts and circumstances, including the information the petitioner received from his or her attorneys before entering the plea." *Id.* at 992. However, *Salazar* is inapplicable here because it was not a Rule 11 case. It was a habeas corpus case, involving the issue of whether the defendant had been deprived of a constitutional right, see id. at 991, which is "more than a violation of the prophylactic provisions of Rule 11." *Id.* at 992. Accord *Haase v. United States*, 800 F.2d 123, 127 (7th Cir.1986); *State ex rel. Vernatter v. Warden*, 207 W.Va. 11, 528 S.E.2d 207, 215-16 (1999). The Court explicitly distinguished "collateral attack" cases like *Salazar* from cases involving "a direct appeal from denial of a

> motion to withdraw a guilty plea." 852 P.2d at 991 n. 6. Since it was looking for a violation of constitutional magnitude, the *Salazar* court did not restrict itself to reviewing only the plea record. Tellingly, the Utah Supreme Court has never applied Salazar's expanded-record standard to a pure Rule 11 case. The Court's post-*Salazar* Rule 11 cases have restricted themselves to the more limited record we have described. See, e.g., *State v. Thurman*, 911 P.2d 371, 374 (Utah 1996). Some of this court's Rule 11 cases may have slightly misconstrued *Salazar*, citing it for the proposition that it does apply to Rule 11 cases. See, e.g., *State v. Ostler*, 2000 UT App 28,¶ 17, 996 P.2d 1065, aff'd on other grounds, 2001 UT 68, 31 P.3d 528; *State v. Stilling*, 856 P.2d 666, 674-75 (Utah Ct.App.1993) (addressing Rule 11 in the context of an Alford plea)."

State v. Lehi 73 P.3d 985, 989 FN 3 (Utah.App., 2003). Therefore, this Court's decision is not against established case law; it falls in line with an established precedent that in appeals based on Rule 11 violations, the record is limited. This Court has stated that in *Salazar*, the Utah Supreme Court looked to circumstantial evidence in order to determine whether a constitutional violation besides Rule 11 was committed. However, it is still well settled that a trial court must strictly comply with Rule 11 and that the record on appeal for a Rule 11 violation is limited.

Since the State's reliance on *Salazar* is inapplicable because the present involves a direct appeal on a Rule 11 violation and not a habeas corpus writ, and because the Court's ruling in *Bluemel* is in accordance with established case law precedent, the Petition for Rehearing should be denied.

Dated this 22 day of May, 2006.

Gregory G. Skordas
Attorney for Tammy Bluemel

CERTIFICATE OF SERVICE

I hereby certify that on this 22 day of May, 2006, I caused two true and correct copies of the foregoing to be deposited in the U.S. Mail, first class, pre-postage paid, addressed to:

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ADDENDUM A

IN THE UTAH COURT OF APPEALS

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Tammy Bluemel, Petitioner and Appellant, v. State of Utah, Respondent and Appellee.	OPINION (For Official Publication) Case No. 20050208-CA F I L E D (April 13, 2006) 2006 UT App 141

Fourth District, Provo Department, 040401880
The Honorable James R. Taylor

Attorneys: Jack M. Morgan and Benjamin A. Hamilton, Salt Lake City, for Appellant
Mark L. Shurtleff and Brett J. DelPorto, Salt Lake City, for Appellee

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Before Judges Bench, McHugh, and Orme.

BENCH, Presiding Judge:

¶1 Tammy Bluemel appeals the dismissal of her petition for post-conviction relief. The trial court concluded that the petition was untimely filed and did not constitute an interests-of-justice exception under the Post-Conviction Remedies Act (PCRA). See Utah Code Ann. § 78-35a-107 (Supp. 2005). We reverse and remand for further proceedings.

BACKGROUND

¶2 Between October 1998 and April 1999, Bluemel allegedly engaged in sexual intercourse with her fourteen-year-old foster son on several occasions and, in one instance, gave him alcohol. Bluemel was charged with seven counts of rape, all first degree felonies, see Utah Code Ann. § 76-5-402 (2003), and one count of supplying alcohol to a minor, a class A misdemeanor, see Utah Code Ann. § 32A-12-203 (2003).

¶3 With the assistance of her trial counsel, Bluemel negotiated a plea agreement, which was reduced to writing as a plea

statement. The plea statement indicated that Bluemel agreed to plead guilty to three counts of rape and one count of supplying alcohol to a minor, while the State agreed to dismiss the other four counts of rape. The plea statement referenced the consequences of entering a guilty plea and discussed basic constitutional rights, such as the right to a jury trial, the right to presumption of innocence, and the State's burden of proof. The plea statement also declared that Bluemel waived these constitutional rights and that she voluntarily entered her pleas. Further, the plea statement indicated that Bluemel read and understood the plea statement, that she was "not under the influence of any drugs, medication, or intoxicants," and that she "knowingly, intelligently, and voluntarily enter[ed]" her pleas.

¶4 During her arraignment, the trial court[1] informed Bluemel that "[b]efore I can accept your pleas, you have certain [c]onstitutional [r]ights that you need to waive. They are talked about in that statement in advance of plea. Do you have any questions about the statement?" Bluemel indicated that she did not have any questions about the plea statement. The trial court went on to ask Bluemel if she understood her constitutional rights and that she would be waiving them. Bluemel responded affirmatively. The trial court then informed Bluemel "that if you wish to withdraw these pleas you need to make a motion in writing to do that within [thirty] days of sentencing" and that the court "would not automatically grant that motion." Bluemel acknowledged that she understood. The trial court then stated, "[s]o if you do intend to plea, then let's have you sign the [plea] statement." Bluemel, her attorney, the prosecutor, and the trial judge all signed the plea statement. Bluemel then verbally entered on the record her guilty pleas to three counts of rape and one count of supplying alcohol to a minor. The trial court accepted the pleas and found that "Bluemel ha[d] knowingly and voluntarily entered her pleas."

¶5 On March 27, 2002, Bluemel was sentenced to three indeterminate terms of not less than five years to life and one indeterminate term not to exceed one year, all of which would run concurrently. Bluemel was immediately taken into custody and remains incarcerated.

¶6 Immediately following her sentencing, Bluemel allegedly informed her trial counsel that she wanted to appeal. Her trial

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1. Judge Guy R. Burningham, who has since retired, presided over Bluemel's arraignment in 2001. Later, in 2005, Judge James R. Taylor presided over and dismissed Bluemel's petition for post-conviction relief. For ease of reference, we refer to both judges as "the trial court."

counsel allegedly advised Bluemel that he would handle her appeal and informed her that she had one year to file her appeal. During her first year in prison, her trial counsel allegedly visited her three times and continually informed her that he was still working on her appeal. Bluemel later attempted to contact her trial counsel concerning the status of her appeal, but he refused to respond to her communications. After one year, Bluemel sought other legal counsel and hired her current counsel in October 2003. After meeting with Bluemel and reviewing the matter, her current counsel filed the petition on May 3, 2004, over two years after her sentencing date. The State moved for dismissal of the petition because it was untimely and did not qualify under the interests-of-justice exception. The trial court dismissed Bluemel's petition and now she appeals the dismissal.

ISSUES AND STANDARD OF REVIEW

¶7 Bluemel argues that the trial court erred in dismissing her petition for post-conviction relief as untimely because her circumstances come within the interests-of-justice exception under the PCRA. See Utah Code Ann. § 78-35a-107. Bluemel asserts that she did not enter knowing and voluntary pleas and received ineffective assistance of counsel, either of which warrants post-conviction relief. Dismissal of a petition for post-conviction relief is reviewed "'for correctness without deference to the [trial] court's conclusions of law.'" Gardner v. Galetka, 2004 UT 42,¶7, 94 P.3d 263 (quoting Rudolph v. Galetka, 2002 UT 7,¶4, 43 P.3d 467).

ANALYSIS

¶8 "[T]he legislature enacted the PCRA to 'establish[] a substantive legal remedy for any person who challenges a conviction or sentence for a criminal offense.'" Id. at ¶9 (second alteration in original) (quoting Utah Code Ann. § 78-35a-102(1) (2002)). Under the PCRA, a person may file a petition for post-conviction relief within one year after "the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken." Utah Code Ann. § 78-35a-107(2)(a). However, an untimely filing may be excused "[i]f the court finds that the interests of justice [so] require." Id. § 78-35a-107(3).

¶9 Bluemel argues that her circumstances in this matter fit within the PCRA's interests-of-justice exception, and that her petition should not have been dismissed. Bluemel claims the exception should be recognized here because (1) she did not enter

knowing and voluntary pleas and (2) she received ineffective assistance of counsel throughout the course of the trial court proceedings. In support of her claim that she did not enter knowing and voluntary pleas, Bluemel argues that the trial court failed to strictly comply with rule 11 of the Utah Rules of Criminal Procedure. See Utah R. Crim. P. 11.[2]

¶10 "The procedures for entering a guilty plea are set forth in rule 11 of the Utah Rules of Criminal Procedure." State v. Benvenuto, 1999 UT 60,¶11, 983 P.2d 556; see also Utah R. Crim. P. 11. "The plea-taking proceedings [in rule 11] are intended to insure that a defendant who pleads guilty knowingly and voluntarily waives the protections the constitution guarantees him or her prior to a trial verdict." State v. Stilling, 856 P.2d 666, 671 (Utah Ct. App. 1993). "A guilty plea must be knowingly and voluntarily made in order to protect a defendant's due process rights." Id. "It is well established under Utah law that we will presume harm . . . when a trial court fails to inform a defendant of his constitutional rights under rule 11." State v. Mora, 2003 UT App 117,¶22, 69 P.3d 838 (omission in original) (citation and quotations omitted). "We presume harm because, by not knowing which rights a defendant is waiving, the defendant cannot make a fully informed decision." Id. (citation and quotations omitted). "If the defendant is not fully informed of his rights prior to pleading guilty, then the guilty plea cannot be voluntary. We cannot accept an involuntary guilty plea and still claim to have done justice." Id. (citation and quotations omitted).

¶11 Under Utah law, the trial court bears the burden of ensuring strict compliance with rule 11. See State v. Gibbons, 740 P.2d 1309, 1312-13 (Utah 1987), appeal after remand on other grounds, 779 P.2d 1133 (Utah 1989). "This means 'that the trial court [must] personally establish that the defendant's guilty plea is truly knowing and voluntary and establish on the record that the defendant knowingly waived his or her constitutional rights.'" State v. Visser, 2000 UT 88,¶11, 22 P.3d 1242 (alteration in original) (quoting State v. Abeyta, 852 P.2d 993, 995 (Utah 1993)). Although the trial court has "a duty of 'strict' compliance" with rule 11, strict compliance "does not mandate a particular script or rote recitation of the rights listed." Id. In Visser, the Utah Supreme Court "reemphasize[d] that the

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2. Because our decision that the trial court did not strictly comply with rule 11 by failing to inform Bluemel of certain constitutional rights is dispositive, we need not address her claim of ineffective assistance of counsel nor Bluemel's argument concerning the influence of prescription medications, which allegedly prevented her from sufficiently understanding her plea.

substantive goal of rule 11 is to ensure that defendants know of their rights and thereby understand the basic consequences of their decision to plead guilty. That goal should not be overshadowed or undermined by formalistic ritual." Id.

¶12 Rule 11(e) identifies specific rights and factors of which the trial court must inform the defendant. See Utah R. Crim. P. 11(e). These include, among other things, that the plea is voluntary, the right to presumption of innocence, the right to counsel, the right against compulsory self-incrimination, the right to a speedy trial before a jury, the right to confront and cross-examine witnesses, and that the defendant waives these rights. See id. Rule 11(e) also requires that the "defendant understand[] the nature and elements of the offense to which the plea is entered, that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements." Id.

¶13 In determining whether a defendant is informed of his or her rights, properly understands them, and voluntarily waives them, the trial court must engage in a plea colloquy with the defendant. See id. Rule 11 provides two avenues whereby the trial court may properly engage in a plea colloquy. The trial court may (1) verbally question the defendant on the record regarding each of the factors and rights described in rule 11(e) or (2) receive a written plea statement from the defendant regarding each of the rights and factors. See id. The plea statement is "used to promote efficiency during a plea colloquy." Mora, 2003 UT App 117 at ¶19. "However, [a plea statement] should be only the starting point, not an end point, in the pleading process." Id. (citation and quotations omitted). "It is critical . . . that strict [r]ule 11 compliance be demonstrated on the record at the time the guilty . . . plea is entered. Therefore, if [a plea statement] is used to aid [r]ule 11 compliance, it must be addressed during the plea hearing." Id. (first omission, and first and third alterations in original) (citations and quotations omitted).

¶14 "The trial court must conduct an inquiry to establish that the defendant understands the [plea statement] and voluntarily signed it." Id. (citation and quotations omitted); see also State v. Maguire, 830 P.2d 216, 217 (Utah 1991) (holding a plea statement is "properly incorporated in the record" when "the trial judge ascertains in the plea colloquy that the defendant has read, has understood, and acknowledges all the information contained therein"), appeal after remand, 924 P.2d 904 (Utah Ct. App. 1996), rev'd on other grounds, 957 P.2d 598 (Utah 1998). At that time, "omissions or ambiguities in the [statement] must be clarified during the plea hearing, as must any uncertainties

raised in the course of the plea colloquy." State v. Smith, 812 P.2d 470, 477 (Utah Ct. App. 1991). Thus, "the efficiency-promoting function of the [plea statement] is thereby served, in that the court need not repeat, verbatim, rule 11 inquiries that are clearly posed and answered in the [statement], unless rule 11 by its terms specifically requires such repetition." Id.

¶15 In this case, the plea statement was not properly incorporated into the record. During the plea colloquy concerning her statement, the trial court asked Bluemel only if she had "any questions about the statement." Bluemel responded that she did not and was directed by the trial court to sign the statement. However, the trial court never asked Bluemel if she actually read, understood, and acknowledged her plea statement. See Maguire, 830 P.2d at 217. Nor did the trial court make any other similar inquiry. We conclude that this was a critical error. As a result, "the [statement] was not properly incorporated into the record, and we may not consider it when determining whether the record establishes that the trial court strictly complied with rule 11." State v. Mora, 2003 UT App 117,¶20, 69 P.3d 838.

¶16 In reviewing the plea colloquy (exclusive of the plea statement) in this matter, the trial court failed to inform Bluemel of all of the rule 11(e) factors and rights. See Utah R. Crim. P. 11(e). Specifically, the trial court failed to inform Bluemel of her "right to the presumption of innocence," that the State carried the burden of proving her guilty "beyond a reasonable doubt," that her "plea is an admission of all those elements," and that she had the "right to compel the attendance of defense witnesses." Utah R. Crim. P. 11(e)(3), (4)(A). As a result, the trial court erred by not fully complying with rule 11 in this matter.

¶17 Additionally, because noncompliance with rule 11 infringes on the constitutional rights of the accused, see State v. Stilling, 856 P.2d 666, 671 (Utah Ct. App. 1993), we conclude that noncompliance with rule 11 readily falls within the interests-of-justice exception under the PCRA, see Utah Code Ann. § 78-35a-107(3). As a result, the trial court erred by dismissing Bluemel's petition for post-conviction relief.

CONCLUSION

¶18 We conclude that the plea statement was not properly incorporated into the record and that the trial court did not sufficiently conduct a rule 11 colloquy with Bluemel. As a result, Bluemel's circumstances qualified under the interests-of-

justice exception to the PCRA and the trial court erred by dismissing her petition. We therefore reverse and remand for further proceedings consistent with this opinion.

Russell W. Bench,
Presiding Judge

¶19 WE CONCUR:

Carolyn B. McHugh, Judge

Gregory K. Orme, Judge